

**Hotel Services Group, Inc. and Teamsters Local 769,
International Brotherhood of Teamsters, AFL-
CIO, Petitioner.** Case 12-RC-8170

April 28, 1999

DECISION ON REVIEW AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On December 18, 1997, the Regional Director for Region 12 issued a Decision and Direction of Election finding, *inter alia*, that the petitioned-for unit of all full-time and regular part-time licensed massage therapists (LMTs) constitutes an appropriate unit within the meaning of Section 9(b) of the Act. Thereafter, on January 2, 1998, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's determination. By Order dated January 13, 1998, the Board granted the Employer's request for review with respect to the appropriateness of the petitioned-for unit.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully examined the record, including the Employer's brief on review, the Board finds, contrary to the Regional Director, that a unit of LMTs, apart from other licensed employees, is not appropriate.

The Employer, a Florida corporation, operates a hotel, resort, and spa in Palm Beach Gardens, Florida. The Petitioner seeks a unit limited to the Employer's 42 LMTs. The Employer argues that the unit should include, at a minimum, the LMTs and all other licensed personnel, *i.e.*, 8 estheticians, 12 nail technicians, and 7 hairstylists/cosmetologists.¹ The Employer contends that all licensed personnel share a strong community of interest with one another.

The Employer's salon and spa services are housed in separate buildings connected by a walkway. The LMTs and estheticians work in the spa building, as do other spa employees (*i.e.*, the programming department employees, front desk employees, locker room attendants, administrative assistants, and pool technicians). The salon building houses the hairstylists, nail technicians, and certain managers.

The record establishes that the LMTs perform body massage services. No other classification may perform such body massage work. The nail technicians perform reflexology massage on the hands and feet, as an extension of the manicure and pedicure service. The estheticians perform facial, neck, and shoulder massage. The hair stylists perform no massage work at all.

¹ The record refers to both cosmetologists and hair stylists. The testimony of the spa director indicates that the hair stylists are, indeed, cosmetologists. In addition, Emp. Exh. 7 shows that there are no classifications known as cosmetologists, only "hair operators."

The record reveals that the LMTs must receive 600 hours of classroom training and pass a 2-day State of Florida exam to receive their license. Nail technicians are licensed after 240 hours of study, estheticians after 270 hours, and cosmetologists/hair stylists after 1200 hours. There is a dispute whether estheticians and hair stylists are required to take a state licensing exam. The Employer's witness claims that estheticians and LMTs must take a licensing exam whereas the Petitioner's witness, an LMT herself, claims that only LMTs and cosmetologists take such an exam.

With respect to the supervision of the licensed personnel, the record reflects that the LMTs are supervised by the training director, who reports to the spa director. The estheticians, hair stylists, and nail technicians report to the salon manager, who also directly reports to the spa director. The Employer's vice president testified that the spa director is responsible for the hiring and firing of all spa personnel. However, the vice president also testified that each individual manager has the right to hire and fire, with the approval of the spa director; all initial interviews are conducted by the human resource department, which refers the applicant to the appropriate department manager. The director of human resources confirms that she prescreens all applicants, forwards the applications to the department managers, and the managers submit a recommendation to the spa director. There is no record evidence regarding the extent to which the spa director independently evaluates all candidates.

With respect to discharges, the human resource manager testified that prior to discharging an employee, the department manager reviews the personnel file with the spa and human resources director. While any department manager can recommend disciplinary action to the spa director, the record does not reflect the extent to which the spa director independently evaluates that recommendation.

If there are conflicts or problems with work schedules, the licensed personnel inform their first-line supervisor and, thereafter, the programming manager, who decides whether to rearrange the schedule. When seeking a schedule change, or even a vacation, the LMTs seek approval from the training director; the nail technicians, estheticians, and hair stylists seek permission from the salon manager.

Regarding wage rates and methods of pay, the record reveals that most licensed personnel, including the LMTs, are paid hourly rates,² plus commission or receive a percentage for services provided.³ All other classifica-

² In this regard, the average hourly wages for the LMTs is approximately \$15; for hair stylists it is \$16; for estheticians it is \$17; and for nail technicians it is \$18.

³ The record reveals that some LMTs are paid hourly rates plus commission and others work solely on commission and earn 15 percent of their services, in addition to a gratuity. Estheticians earn an hourly

tions are paid solely by the hour, at rates that are substantially lower than the average hourly wages for the licensed personnel. All spa employees share similar benefit packages.

With regard to interchange among the licensed personnel, the record reveals that there are 10 LMTs who are also licensed as estheticians and perform 25 percent of the facial work at the spa. The record also establishes that nail technicians provide facials, although how often is unclear from the record. Also regarding interchange, the spa director testified that she has asked the LMTs to fill in for estheticians who are on vacation. The record, in addition, reveals that all licensed personnel briefly encounter one another when escorting clientele to and from the locker rooms.

The Act requires an election in an appropriate unit. This does not mean that the unit must be the most appropriate, or that there might not be other units that are more appropriate. *Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950), *enfd.* on other grounds 190 F.2d 576 (7th Cir. 1951); see *Staten Island University Hospital*, 24 F.3d 450, 455 (2d Cir. 1994). We find, however, contrary to the Regional Director, that the LMTs are not an appropriate unit because they do not possess a separate community of interest apart from the Employer's other licensed personnel.⁴ In so finding, we rely primarily on the following: the broader unit urged by the Employer consists only of the licensed spa personnel; most of them perform similar work; their method of compensation is similar; some LMTs are licensed as estheticians and perform 25 percent of the estheticians' facial work; and all employees receive the same benefits.

The LMTs, nail technicians, hair stylists/cosmetologists, and estheticians are all licensed after successful completion of many hours of training/schooling. Although the LMTs possess "distinct skills," the esthetician

and nail technicians perform some massage work, albeit limited to different areas of the body. The hair stylists/cosmetologists do not perform any massage work, however, it is clear, as noted above, that they must have a substantial amount of schooling/training. There is also interchange among the LMTs and estheticians. In this regard, 10 of the LMTs have esthetician licenses and perform 25 percent of all facials at the spa. Nail technicians have also performed facials.

Finally, the method of compensating these licensed employees, including the LMTs, is different from that for other spa employees. Most licensed personnel's wages are based, in whole or in part, on commission or gratuity. Most licensed personnel are paid solely on commission or commission plus gratuity; some are paid a combination of hourly rates plus gratuity. In this regard, hair stylists and nail technicians earn 50 percent of their services plus a 15-percent gratuity, while estheticians and most LMTs earn an hourly rate plus a 15-percent gratuity. In addition, the average hourly wages for all licensed personnel range from \$15 to \$18 per hour, substantially higher than for other employees.

Although the LMTs, in some respects, are separately supervised by the training manager and the remaining licensed personnel are supervised by the salon manager, the Board has long held that a difference in supervision does not necessarily mandate excluding differently supervised employees. See *Texas Empire Pipe Line Co.*, 88 NLRB 631, 632 (1950). Moreover, there is some evidence of limited central control over the hiring and firing of employees exercised by the Employer.

In these circumstances, we find that the petitioned-for unit of LMTs only is not appropriate. In rejecting the petitioned-for unit, we do not suggest a precise unit finding. Rather, we direct that the petition be dismissed without prejudice to the Petitioner's right to refile the petition in another unit.

ORDER

The petition is dismissed.

rate plus a 15-percent gratuity; hairstylists and nail technicians earn 50 percent of their services plus a 15-percent gratuity on their services.

⁴ See, e.g., *Brand Precision Services*, 313 NLRB 657 (1994); *Phoenixian*, 308 NLRB 826 (1992); see also, *Transerv Systems*, 311 NLRB 766 (1993).